STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2003
v	No. 239275 Grand Traverse Circuit Court
VINCENT DARRYL EATON, Defendant-Appellant.	LC No. 01-008388-FC

Before: Hoekstra, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with the intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 114 to 240 months' imprisonment. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

This case arises from the complainant's allegations that in January 2001, defendant, while armed with a knife, sexually assaulted her. According to the complainant, defendant came to her apartment, which she shared with her boyfriend, and when her boyfriend left to buy cigarettes, defendant demanded sex from her. When she refused, defendant grabbed her and began pounding her head into the floor. Then, holding a knife, defendant threatened to slit her throat if she declined to remove her clothes and perform oral sex on him. Contrary to the complainant's testimony, defendant testified that complainant asked him to have sex with her, he agreed, and then she began performing oral sex on him. However, after a few minutes, she stopped performing oral sex, and when defendant tried to persuade her to continue, she grinned and giggled at him, which embarrassed and angered him. Thereafter, defendant grabbed her and hit her several times, then retrieved a knife from the kitchen "to put fear, a lot of it [in her]."

On appeal, defendant first argues that the trial court erred in granting the prosecution's motion to exclude testimony concerning the complainant's veracity. Specifically, defendant sought to admit testimony from several people, including a Family Independence Agency caseworker, police officers, and a doctor, among others, concerning incidents of the complainant's untruthful behavior, but the trial court prohibited admission on the basis that the testimony concerned collateral matters.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995); *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002). "'An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias.'" *Werner, supra*, quoting *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

"As a general rule, . . . a witness may not be contradicted regarding collateral, irrelevant, or immaterial matters." *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). With regard to attacking a witness' credibility, MRE 608(b) provides in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Extrinsic evidence may not be used to impeach a witness on a collateral matter even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, which is otherwise admissible under MRE 613(b). *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). In *People v Guy*, 121 Mich App 592, 604-605; 329 NW2d 435 (1983), this Court explained:

> The purpose of the rule that a witness cannot be impeached on a collateral matter by use of extrinsic evidence is to avoid the waste of time and confusion of issues that would result from shifting the trial's inquiry to an event unrelated to the offense charged. In order to apply the rule it is necessary to determine what facts are deemed "collateral." According to McCormick, Evidence (2d ed), § 47, p 98, facts which would have been independently provable are not considered collateral for the purpose of this rule.
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> In further discussing the application of the rule, McCormick indicates there are three kinds of facts that are not considered to be collateral. The first consists of facts directly relevant to the substantive issues in the case. The second consists of facts showing bias, interest, conviction of crime and want of capacity or opportunity for knowledge. The third consists of any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he would not have been mistaken about if his story were true.

Here, the testimony of the proposed witnesses was to reveal the complainant's statements about a satanic cult, an alleged murder, the complainant's health care and the health care of her daughter, but such testimony does not fall within any of these categories. The proposed evidence

is not substantively relevant to the instant claim of criminal sexual assault, and thus the trial court did not abuse its discretion in refusing to admit it.

To the extent that defendant further argues that the trial court erred in denying the admission of opinion evidence from the caseworker, doctor, and nurse, because the trial court failed to first review the records in camera pursuant to *People v Stanaway*, 446 Mich 643, 679-84; 521 NW2d 557 (1994), we find his argument without merit. In *Stanaway*, our Supreme Court held that "in an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense." *Id*. at 677. Here, although the trial court acknowledged in its ruling on the prosecution's motion to exclude testimony that *Stanaway* provides for in camera review of otherwise privileged records of physicians or social workers, defendant never requested an in camera review of privileged information. To the contrary, defense counsel summarized in detail the testimony that the witnesses would give if the trial court denied the prosecution's motion. This summary demonstrates that defendant knew what the witnesses' testimony would concern and took the opportunity to inform the trial court regarding the substance of their testimony before the trial court ruled on the motion. Under these circumstances, we find that on appeal defendant cannot claim error for the trial court's failure to conduct an in camera review.

Defendant also argues that the trial court erred in failing to instruct the jury that voluntary intoxication is a defense to the specific intent crime of assault with intent to commit criminal sexual conduct. We disagree.

Generally claims of instructional error are reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). However, defendant failed to object to the instructions at trial; therefore, the issue was not properly preserved for appeal, and our review is limited to whether the jury instructions amounted to outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Even if defendant satisfies this requirement, whether to reverse is within the appellate court's discretion; reversal is warranted only when the outcome-determinative plain error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

"Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Kurr*, *supra* (citations omitted). The trial court's instructions to the jury must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). "A defense of intoxication is only proper if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent." *People v Mills*, 450 Mich 61, 82; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

In the present case, despite that when given a breathalyzer test defendant registered at twice the legal limit, his own testimony established that he was able to form the required intent to

commit the crime. Defendant testified in great detail concerning his activities during the evening in question. Throughout his testimony, defendant described his acts, thoughts and emotions in detail as well as his intent as he interacted with the complainant and thereafter hit her and then retrieved a knife and confronted her. In our view, defendant's detailed recollection of the events leading to and throughout the incident belies his claim that an instruction on voluntary intoxication should have been given to the jury. The trial court did not err in failing to give a voluntary intoxication instruction because there is no indication in the record that defendant "was incapable of forming the intent to commit this crime." *Mills, supra* at 83; see also *People v Coddington*, 188 Mich App 584, 604; 470 NW2d 478 (1991) (Instruction on voluntary intoxication not warranted where the defendant's testimony "revealed that his drinking did not affect his behavior."); cf *People v Gomez*, 229 Mich App 329, 333; 581 NW2d 289 (1998) (Voluntary intoxication instruction not warranted where police officer merely suspected intoxication and the defendant "had no trouble landing multiple blows on the victim."). Defendant has failed to show outcome-determinative plain error. *Carines, supra*.

Because an instruction on voluntary intoxication was not warranted, defendant's ineffective assistance of counsel claim with respect to the jury instructions is without merit. *Stanaway, supra* at 687-688 (the defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not ineffective for failing to advocate a meritless position).

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Brian K. Zahra